

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 18-50880  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

July 12, 2019

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LUIS HERNANDEZ VARGAS,

Defendant-Appellant

Cons. w/No. 18-50881

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LUIS MANUEL HERNANDEZ-VARGAS,

Defendant-Appellant

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Appeals from the United States District Court  
for the Western District of Texas  
USDC No. 2:18-CR-746-1  
USDC No. 2:18-CR-81-1

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No. 18-50880  
c/w No. 18-50881

Before HIGGINBOTHAM, GRAVES, and DUNCAN, Circuit Judges.

PER CURIAM:\*

Luis Manuel Hernandez Vargas appeals the 51-month within-guidelines sentence imposed following his guilty plea conviction for illegal reentry into the United States. He argues that his sentence is unconstitutional because it exceeds the two-year statutory maximum sentence of 8 U.S.C. § 1326(a). He concedes that the issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he wishes to preserve it for further review. The Government has filed an unopposed motion for summary affirmance, arguing that the issue is foreclosed under *Almendarez-Torres*. Alternatively, the Government requests an extension of time to file its brief.

Summary affirmance is appropriate if “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). In *Almendarez-Torres*, 523 U.S. at 226-28, 235, the Supreme Court held that for purposes of a statutory sentencing enhancement, a prior conviction is not a fact that must be alleged in an indictment or found by a jury beyond a reasonable doubt. We have held that subsequent Supreme Court decisions did not overrule *Almendarez-Torres*. See *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625-26 (5th Cir. 2007). Hernandez Vargas’s argument is, as he concedes, foreclosed. Accordingly, the Government’s motion for summary affirmance is GRANTED, the Government’s alternative motion for an

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.